

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 130

Docket No. SF-0353-07-0731-I-1

**Kevin R. Bell,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

July 14, 2009

Kevin R. Bell, Temecula, California, pro se.

Joanne H. Kim, Long Beach, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of a February 19, 2008 initial decision that dismissed his appeal as settled. For the reasons set forth below, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 On August 15, 2007, the appellant filed an appeal in which he contended that the agency had denied his request for restoration to duty following a compensable injury. Initial Appeal File (IAF), Tab 1. At that time, the appellant also had a civil action against the agency pending in federal district court.

Although the appellant was pro se in his Board appeal, he was represented by counsel in his civil action. IAF, Tab 68 at 3, 15. While the Board appeal was pending, counsel for the appellant and counsel for the government negotiated a global settlement agreement in the civil action that resolved, as relevant here, the Board appeal, the civil action, and a number of pending equal employment opportunity (EEO) complaints. *Id.* at 6-15. Under the terms of the agreement, the appellant, inter alia, accepted a reassignment to a GS-12, step 4 Mission Support Specialist position at the Murrieta Station in Murrieta, California. *Id.* at 7, ¶¶ 2-3. The agency agreed to give the appellant some back pay, \$10,000 in compensatory damages, and some attorney fees. *Id.* at 7-10, ¶¶ 4-6. The agency canceled a two-day suspension, and the appellant agreed to withdraw various EEO complaints and his pending Board appeal, but not a pending claim for Office of Workers' Compensation Programs benefits. *Id.* at 10-12, 14, ¶¶ 8, 14-15, 20.

¶3 The administrative judge issued an initial decision in which she found that the Board has jurisdiction over the appeal, the parties had reached a settlement that would result in the withdrawal of the appeal; she found that the parties understood the terms of the agreement, it was lawful on its face and was freely entered into, and it would be entered into the record for enforcement purposes. *Bell v. Department of Homeland Security*, MSPB Docket No. SF-0353-07-0731-I-1, slip op. at 1-2 (Initial Decision, Feb. 19, 2008) (I.D.). She therefore dismissed the appeal as settled. *Id.* at 2-3. The initial decision informed the parties that it would become the final decision of the Board on March 25, 2008, unless a party filed a petition for review by that date. *Id.* at 3.

¶4 On May 2, 2008, the appellant filed a petition for enforcement in which he contended that the agency violated the settlement agreement. Compliance File, MSPB Docket No. SF-0353-07-0731-C-1, Tab 1. In a compliance initial decision, the administrative judge found that the appellant failed to show that the agency was not in compliance with the settlement agreement. *Bell v. Department of Homeland Security*, MSPB Docket No. SF-0353-07-0731-C-1 (Compliance

Initial Decision, June 20, 2008). The appellant petitioned for review of the compliance initial decision, and the Board denied the petition for review in a Final Order issued on November 17, 2008, that also forwarded certain new allegations of noncompliance to the regional office for adjudication as a new petition for enforcement.¹ Compliance File, MSPB Docket No. SF-0353-07-0731-C-2 (CF II), Tab 1.

¶5 The administrative judge properly docketed the new allegations of noncompliance as a second petition for enforcement. However, during the adjudication of the second petition for enforcement, the appellant, through his designated attorney of record, contended that the settlement agreement was invalid due to mutual mistake and/or bad faith on the part of the agency. CF II, Tab 16. The administrative judge ultimately found that the appellant failed to show that the agency was not in compliance with the settlement agreement. *Bell v. Department of Homeland Security*, MSPB Docket No. SF-0353-07-0731-C-2 (Compliance Initial Decision, Mar. 2, 2009).

¶6 On April 4, 2009, the appellant filed a pro se petition for review of the second compliance initial decision. Petition for Review (PFR) File, Tab 1. In his petition for review, he again appeared to claim that the settlement agreement was invalid. *Id.* at 1, 17, 23-24, 29-30, 38. The Clerk of the Board issued a notice which stated that it was construing the petition for review as a petition for review both of the second compliance initial decision² and of the initial decision dismissing the underlying appeal as settled. PFR File, Tab 2. The notice stated

¹ The appellant resigned his position effective June 29, 2008. He filed an appeal in which he contended that his resignation was involuntary due to intolerable working conditions and a failure to reasonably accommodate a disability. The administrative judge dismissed the appeal for lack of jurisdiction, and the Board denied the appellant's petition for review of that initial decision in a Final Order issued on March 12, 2009. See *Bell v. Department of Homeland Security*, [110 M.S.P.R. 661](#) (2009) (Table).

² The merits of the appellant's petition for review of the second compliance initial decision is under separate adjudication in MSPB Docket No. SF-0353-07-0731-C-2.

that any petition for review of the initial decision in the underlying appeal was due on March 25, 2008, and, therefore, the appellant's petition for review was untimely filed. *Id.* The Clerk of the Board informed the appellant that the Board's regulations required untimely-filed petitions for review to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing. *Id.* The Clerk enclosed a copy of the Board's "Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit" and ordered the appellant to file his motion and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing on or before May 23, 2009. *Id.* The appellant has not responded to the Clerk's notice. The agency filed a designation of agency representative, but has not responded in opposition to the appellant's petition for review. PFR File, Tab 3.

ANALYSIS

¶7 An attack on the validity of a settlement agreement must be made in the form of a petition for review of the initial decision dismissing the case as settled. *See, e.g., Armstrong v. Department of the Treasury*, [110 M.S.P.R. 533](#), ¶ 10 (2009); *Nichols v. Department of the Air Force*, [102 M.S.P.R. 551](#), ¶ 7 (2006), *aff'd*, 253 F. App'x. 961 (Fed. Cir. 2007). A petition for review must be filed within thirty-five days after the date of issuance of the initial decision or, if the decision was received more than five days after its issuance, within thirty days after receipt. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); *Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 7 (2007); [5 C.F.R. § 1201.114](#)(d). The Board will waive the filing deadline only upon a showing of good cause for the delay in filing. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *Stribling*, [107 M.S.P.R. 166](#), ¶ 7; [5 C.F.R. § 1201.114](#)(f). To establish good cause for an untimely filing, a party must show that he exercised due diligence or

ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table). It is well-settled that an appellant's belated dissatisfaction with the terms of a settlement agreement does not constitute good cause for his filing delay. *McPherson v. Department of the Treasury*, 104 M.S.P.R. 547, ¶ 12 (2007).

¶8 Here, the deadline for filing a petition for review was March 25, 2008, and the appellant filed his petition for review on April 4, 2009, more than one year late. IAF, Tab 70 at 3; PFR File, Tab 1. The appellant has not alleged that he received the initial decision more than five days after it was issued. PFR File, Tab 1. Although the Clerk afforded the appellant the opportunity to show good cause for the untimely filing, the appellant has not offered any reason for the delay in filing his petition for review, and he failed to respond to the Clerk's notice on the untimeliness of his petition for review. Thus, despite his pro se status, we find that the appellant has failed to demonstrate good cause for the untimeliness of his petition for review. *See Garside v. Office of Personnel Management*, [109 M.S.P.R. 65](#), ¶ 6 (2008); *Roberts v. Department of Commerce*, [106 M.S.P.R. 674](#), ¶ 5 (2007); *Smith v. Department of the Army*, [105 M.S.P.R. 433](#), ¶ 6 (2007).

¶9 The appellant appears to assert in his petition for review that the agency fraudulently induced him into signing the settlement agreement by leading him to believe that it would assign him to a specific GS-12, step 4 Mission Support

Specialist position at the Murrieta Station in Murrieta, California, when in fact there was no such position at that duty location, and the position was “undetermined.” PFR File, Tab 1 at 3. Assuming *arguendo* the truth of the appellant’s assertions, he necessarily learned of the agency’s alleged fraud shortly upon his return to duty following the settlement agreement, and certainly prior to his resignation from the agency on June 29, 2008. However, he did not contend that the settlement agreement was invalid until his attorney first raised the issue in a pleading dated January 19, 2009. CF II, Tab 16. In that pleading, the appellant’s designated representative cited as legal authority a number of published Board decisions, including *Brady v. Department of the Navy*, [95 M.S.P.R. 619](#) (2004). CF II, Tab 16 at 2. The *Brady* decision contains language that explicitly states that an attack on the validity of a settlement agreement must be made through a petition for review of the initial decision dismissing the appeal as settled. *Brady*, [95 M.S.P.R. 619](#), ¶ 5. The *Brady* decision also contains language that reasonably should have put counsel on notice that there may be a question of timeliness involved when there is a delay between the dismissal of an appeal as settled and an allegation that the settlement agreement should be set aside as invalid. *Brady*, [95 M.S.P.R. 619](#), ¶ 7 & n. Inexplicably, however, the appellant did not seek review of the initial decision dismissing his appeal as settled until April 4, 2009. PFR File, Tab 1. The appellant is responsible for the errors of his chosen representative. *See, e.g., Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

¶10 Even assuming, therefore, that the appellant did not have a basis for seeking review of the initial decision dismissing his appeal as settled until June 29, 2008, he has not shown that he acted with due diligence or reasonable prudence in filing his petition for review, particularly in light of his designated representative’s failure to file a petition for review despite his awareness via the *Brady* decision of the requirement that he do so. *See Nichols*, [102 M.S.P.R. 551](#),

¶ 9. Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

ORDER

¶ 11 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision remains the final decision of the Board concerning the dismissal of the appeal as settled. Title 5 of the Code of Federal Regulations, section 1201.113 ([5 C.F.R. § 1201.113](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at

our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.